Supreme Court, U. S.
FILED
DEC 27 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-741

MIZOKAMI BROS. OF ARIZONA, INC., an Arizona corporation,

Petitioner,

v.

BAYCHEM CORPORATION, a Delaware and New Jersey corporation; BAYER DE MEXICO, S.A., a corporation of the United States of Mexico; and BAYER AG, a corporation of the Federal Republic of Germany,

Respondents.

BRIEF OF BAYCHEM CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

S. THOMAS CHANDLER
1110 Transamerica Building
177 North Church Avenue
Tucson, Arizona, 85701

Attorney for Respondent,
Baychem Corporation

Of Counsel:

JACK REDHAIR
ROBERT E. LUNDQUIST
CHANDLER, TULLAR, UDALL & REDHAIR
1110 Transamerica Building
177 North Church Avenue
Tucson, Arizona 85701

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 9

I. A DISTRICT COURT HAS INHERENT DISCRETIONARY POWER TO DISMISS A COMPLAINT ON THE BASIS OF *Forum Non Conveniens*, NOTWITHSTANDING 28 U.S.C. § 1404 (a) (1976) 9

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE CASE AS AGAINST RESPONDENT BAYCHEM ON THE GROUND OF *Forum Non Conveniens;* THE NINTH CIRCUIT COURT OF APPEALS APPLIED THE PROPER STANDARD IN REVIEWING THE DISTRICT COURT'S DECISION AND AFFIRMANCE WAS PROPER 12

A. Construction of the Pleadings and Other Materials Presented to the District Court on a Motion to Dismiss for Lack of Personal Jurisdiction or for *Forum Non Conveniens* 12

B. The District Court's Dismissal of this Case as Against Respondent Baychem on the Ground of *Forum Non Conveniens* Was Not an Abuse of Discretion 14

III. THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI .. 18

CONCLUSION 19

APPENDIX

TABLE OF AUTHORITIES

PAGE

CASES:

B. M. Heede, Inc. v. *West India Machinery & Supply Co.*, 272 F.Supp. 236 (S.D.N.Y. 1967) 11

Burt v. *Isthmus Development Co.*, 218 F.2d 353, (5th Cir.), *cert. denied*, 349 U.S.922 (1955) 12

Collins v. *American Automobile Insurance Co.*, 230 F.2d 416 (2d. Cir. 1956) 10-11

Fitzgerald v. *Texaco*, 521 F.2d 448 (2d Cir. 1975), *cert. denied*, 423 U.S.1052 (1976) 9

Gross v. *Owen*, 221 F.2d 94 (D.C. Cir. 1955) 10

Gulf Oil Corp. v. *Gilbert*, 330 U.S.501 (1947) . 14, 15, 18

Harbolt v. *Carpenter*, 536 F.2d 791 (8th Cir. 1976) 11

Hoffman v. *Goberman*, 420 F.2d 423 (3d Cir. 1970) 18

Ireland v. *Woods*, 246 U.S.323 (1917) 18

J. I. Case Co. v. *NLRB*, 321 U.S.332 (1944)..... 18

J. F. Pritchard & Co. v. *Dow Chemical of Canada, Ltd.*, 462 F.2d 998 (8th Cir. 1972)...9-10, 11, 17, 18

Jensen v. *McInerney*, 299 F.Supp. 1309 (D.V.I., 1969) 13

Kisko v. *Penn Central Transportation Co.*, 408 F. Supp. 984 (M.D. Pa. 1976) 11

Norwood v. *Kirkpatrick*, 349 U.S.29 (1955) 10

Paper Operations Consultants International, Ltd. v. *SS Hong Kong Amber*, 513 F.2d 667 (9th Cir. 1975) 9, 14, 18

Prack v. *Weissinger*, 276 F.2d 446 (4th Cir. 1960) 10

Rogers v. *Helvering*, 320 U.S.410 (1943) 18

PAGE

Schwartz v. *Schwartz*, 103 Ariz.562, 447 P.2d 254 (1968) 16

Timberlane Lbr. Co. v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976) 13

United States v. *Orshek*, 164 F.2d 741 (8th Cir. 1947) 13

Vanity Fair Mills, Inc. v. *T. Eaton Co.*, 234 F.2d 633 (2d Cir.), *cert. denied*, 352 U.S.871 (1956) ..10, 11

Yerostathis v. *A. Luisi, Ltd.*, 380 F.2d 377 (9th Cir. 1967) 10

STATUTES AND RULES:

28 U.S.C. § 1404 (a) (1976) 9, 14

SUP. CT. R. 19 18

FED. R. CIV. P. 12 (b)(2), (3) 12

OTHER AUTHORITIES:

1 J. MOORE, FEDERAL PRACTICE ¶ 0.145 (2d ed. 1975) 10

5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1363 (1969) 12

15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3828 (1976) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-741

MIZOKAMI BROS. OF ARIZONA, INC.,
an Arizona corporation,

Petitioner,

v.

BAYCHEM CORPORATION, a Delaware and New Jersey corporation; BAYER DE MEXICO, S.A., a corporation of the United States of Mexico; and BAYER AG, a corporation of the Federal Republic of Germany,

Respondents.

BRIEF OF BAYCHEM CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

I. Whether a district court has inherent discretionary power to dismiss a civil complaint on the basis of *forum non conveniens* where the only proper forum is in a foreign country.

II. Assuming the answer to the first question is positive, whether the district court abused its discretion in dismissing the complaint against Respondent Baychem on the ground of *forum non conveniens* where (a) allegedly Petitioner is an Arizona corporation with a subsidiary in Mexico who entered into agreements in Mexico concerning the

financing of crops grown in Mexico; (b) the claim arose out of the sale of an insecticide in Mexico, where alleged misrepresentations were made by a Mexican citizen or citizens to another Mexican citizen or citizens concerning the acceptability by the United States and Canada of bell peppers on which the insecticide was used; (c) it was conceded in the district court that the law of Mexico would apply to the case, and the complaint refers to and relies on the applicability of Mexican law; (d) most of the witnesses necessary for Respondents to defend this case are citizens of Mexico and beyond the process of the courts of the United States; and (e) the only matters forming a nexus between the forum in Arizona and the alleged wrong are that Petitioner resides in the forum, Respondent Baychem does business in the forum (in matters unrelated to the cause of action), and some of the peppers grown by Petitioner's business associates in Mexico were denied entry to the United States at a border station located in the forum.

(The matters raised by Petitioner's Questions Presented III, IV and V concern minimum due process contacts necessary for *in personam* jurisdiction over the other respondents. Respondent Baychem will defer to those parties for responses to these questions.)

STATEMENT OF THE CASE

Petitioner's complaint was filed below in October, 1973 (R. 6). Respondents timely filed motions to dismiss based on lack of *in personam* jurisdiction and on *forum non conveniens* (R. 71, 123 and 159). Numerous affidavits were filed by all parties, voluminous interrogatories were submitted and answered, and requests for production of documents were filed and complied with. The record alone in this case consists of over 1,400 pages plus hundreds of pages of exhibits filed as attachments to answers to interrogatories. It is on these affidavits, interrogatory answers and exhibits, and on memoranda and arguments of counsel that the District Court for the District of Arizona based its ruling herein and entered its judgment on May 27, 1975. Transcript of Hearing on the Motions to Dismiss at 43 (Supplemental Designation of Record on Appeal). Contrary to Petitioner's assertion which is inherent throughout its brief but is not specifically stated until page 23 thereof, in ruling on a motion to dismiss for lack of personal jurisdiction or on the basis of *forum non conveniens,* the "pleadings and *other* material" (Petition at 23, emphasis added), are not to be construed most favorably to the plaintiff or taken as true, but, rather, in considering such motions, the district court is to view the affidavits, interrogatory answers, and other evidence submitted in determining the facts to which the applicable legal principles are then applied. See III. A, *infra.* The district court determined the facts necessary for analysis under the applicable principles and, in the exercise of its discretion, dismissed the case as to all parties on the ground of *forum non conveniens,* and as to Bayer AG and Bayer de Mexico on the ground of lack of *in personam* jurisdiction. The Ninth Circuit Court of Appeals applied the appropriate standard of review and affirmed the district court in the opinion attached in the appendix to the Petition at pages A-1 through A-4. There are no special or important reasons for granting a writ of certiorari in this case.

Petitioner's complaint alleged losses due to the failure of a portion of a crop grown in Mexico to gain entry into the United States, because the crop, bell peppers, contained a residue of a pesticide called Tamaron. These bell peppers were grown, harvested and shipped in Mexico by a Mexican grower or growers allegedly financed by Petitioner's Mexican subsidiary corporation.

Tamaron was manufactured by Baychem. Baychem is a once-removed subsidiary of Bayer AG. Bayer de Mexico is a corporation formed under the laws of Mexico and is also a once-removed subsidiary of Bayer AG.

Contrary to Petitioner's assertion that "Bayer AG dominated and controlled its subsidiary, Baychem" (Petition at 5), the evidence adduced below did not establish this, nor does Petitioner's citation to R. 1265-1270 support this allegation. That citation is to a document entitled "Plaintiff's Summary of Defendants' Answers to Interrogatories" and is merely Petitioner's characterization of what it would like to have seen the trial court draw from those answers. Obviously, the trial court did not draw these conclusions, as indeed it should not have, since the Bayer AG-Baychem relationship involved only those incidents which are normal between a parent and subsidiary (R. 93-95, 97, 102, 104, 243, 287, 301, 314, 346, 359, 361, 366, 1008, 1010-11, 1019). The fact remains that they are independent corporations. Furthermore, Petitioner's allegation that Baychem and Bayer de Mexico are the agents of each other and therefore that the acts of Bayer de Mexico and Baychem became binding on each other is an argument not presented below and not supported by any legal authority. The evidence set forth in the citations listed by Petitioner establishes only that Baychem entered into an agreement with Bayer de Mexico, written in Spanish, which permitted the latter to solicit orders for the former's products. Any such order procured was not to be binding on Baychem until it had Baychem approval, the prices of Baychem's products were subject to change without notice, and Bayer de Mexico was in no way authorized to bind Baychem. (There is no evidence that Bayer de Mexico ever procured orders pursuant to this agreement.) This "agency" certainly is not such that the acts of "Bayer de Mexico and Baychem . . . became binding on each other" (Petition at 6).

The pepper crop was grown in Mexico in 1973. Tamaron insecticide was manufactured in the United States by Baychem and sold to Bayer AG.[1] Bayer AG in turn sold it to Bayer de Mexico. Bayer de Mexico in turn distributed Tamaron in Mexico through a completely independent Mexican entity called Vamex, who in turn allegedly sold it to the Mexican growers. Thus, the cause of action arose out of a sale of the pesticide in Mexico between citizens of Mexico. Central to the claim are the representations of employees of Vamex to the Mexican growers. The affidavits cited by Petitioner show these representations to involve what may have been said by representatives of Vamex to the growers, what may have been said by representatives of Bayer de Mexico to the growers, what may have been said by Bayer de Mexico to Vamex concerning the insecticide, and what may have been said by Vamex to the growers about what the employees of Bayer de Mexico had said to Vamex concerning the insecticide.

The assertion on page 6 of the Petition that Petitioner, rather than the Mexican growers, had purchased the Tamaron from Vamex was not raised below and there is no support for it in any of the materials presented to the Court

---

[1]Baychem sent a document entitled "Technical Data Sheet" under the heading Chemagro, a division of Baychem, dated April, 1972 to Bayer AG (R. 314 & attached exhibit). In bold letters at the top, the document declared "FOR EXPERIMENTAL USE ONLY." *Id.* It further declared that "Monitor [Tamaron] is available for *testing* in the formulations listed below. It is required that the nature of a contemplated project be specified when requesting samples." *Id.* (Emphasis added.) On the second page of this document, another bold heading declares "FOR EXPERIMENTAL USE ONLY" and "the rates and uses mentioned in the following sections . . . *are not registered for commercial use* and are provided only for the information of and use by qualified persons engaged in *research or experimental activities.*" *Id.* (Emphasis added.) A second, similar document, dated March, 1973 entitled "Technical Information" was also sent to Bayer AG (R. 314 and second document included as an attachment to Answer to Interrogatory #221 [no page no. assigned]).

below. The Record at 1049 merely refers to a "consolidated financial statement" for the 1972-73 growing season which claimed insecticide as an expense by the growers and the Record at 1060 is simply unrelated to any such argument. Furthermore, Petitioner answered an interrogatory below by stating the contrary position that it bought crops "through" its Mexican subsidiary (R. 1045).

Petitioner states:

> "The Respondents knew that such Tamaron was being purchased by Petitioner for use on peppers grown for export into Arizona and for consumption in the United States and Canada . . . [and] both expressly and impliedly warranted that Tamaron was suitable for use on Petitioner's bell peppers intended for importation into Arizona." Petition at 7.

The only citations to the record offered in support of this assertion are to Petitioner's complaint. The extent of discovery and litigation subsequent to the filing of the complaint is manifest from the size of the record. As noted below, the allegations of Petitioner's complaint are not to be taken as true under such circumstances. Indeed, as to Baychem, the uncontroverted evidence before the district court establishes that Baychem did not have such knowledge, nor did it warrant anything to anyone other than what was expressed in its technical data sheets to Bayer AG (see n.1, *supra*).

Petitioner spends numerous paragraphs detailing "the events which occurred in Arizona" in its brief at 7-9. The only event of possible significance which occurred in Arizona is that when small portions of the peppers reached the United States border, and later Canada, they were denied entry because they contained a residue of Tamaron. The remainder of Petitioner's assertions are merely attempts to manufacture as many "events" as possible, which

are in reality merely incident to the rejection, and which could have no possible effect on the issues here involved. Moreover, many of these asserted "events" have no support in the record.

Petitioner further asserts in its statement of the case that the convenience of the witnesses favors Arizona. This statement is not correct—the convenience of *Petitioner's* witnesses may favor Arizona. Respondent Baychem would have been precluded from defending this case altogether had the district court accepted jurisdiction. Although Petitioner recognizes that "some other testimony of events occurring in Mexico may be needed . . . ", Petition at 10, it claims that both the quantity and quality of testimony concerning events in Arizona will be greater than that concerning the events in Mexico. This would surely be the case had this matter been tried in the District of Arizona and for good reason—witnesses necessary for Respondent Baychem's defense, such as the Mexican growers, employees of Vamex, and other potential witnesses would have been beyond the subpoena power of the courts of the United States. An absent witness produces no quantity or quality evidence.

Petitioner asserts that the "short statute of limitations in Mexico has run (1278, 1404)" (Petition at 10). The only evidence presented before the district court concerning the Mexican statute of limitations consisted of an affidavit of a Mexican lawyer filed by Respondents giving the opinion that the statute had not run (R. 163-169); Petitioner in response thereto filed a letter authored by another Mexican lawyer which contended that a different Mexican statute applied and that this statute had in fact run out. Thus, it is unclear whether the statute has run in Mexico. In any event, Petitioner has made no attempt to bring an action in Mexico. Furthermore, Respondent Baychem offered to waive the statute of limitations in Mexico in connection

with the appeal to the Ninth Circuit Court of Appeals if in fact the statute had run (Appendix at 1a).

Petitioner's attack on the opinion of the Ninth Circuit Court of Appeals in this matter is unavailing. That court, faced with this record, the briefs filed therein, and applying the correct standard of review in such a matter merely affirmed that the district court did not abuse its discretion in this case. It is readily apparent that the Ninth Circuit's statements that all transactions between the parties, as well as the claim itself, arose in Mexico and that the only effect alleged in Arizona was the loss to Petitioner by the failure of the vegetables to gain entry into this country are true. Petitioner's novel assertion that it, while in Arizona, purchased the Tamaron from Vamex, and that it had not been purchased by the Mexican growers from Vamex, is not supported by the record. Moreover, it is raised here for the first time. This contention, as well as the contention that Baychem sold the Tamaron knowing that some of it would be imported into Arizona on Petitioner's peppers, was dealt with above. Beyond this, however, Petitioner borders on the scandalous, when it implies that Baychem had recommended Tamaron (Monitor 4) for use on bell peppers to American farmers even though it had not been properly registered in the United States, but that Baychem "had not . . . been caught" (Petition at 12). There is no support for such an outlandish assertion. The citation to the record there contained is meaningless.

Petitioner carries its pettifoggery one step further when it asserts that the Ninth Circuit Court of Appeals confused Baychem, the U.S. subsidiary, with a foreign corporation. Anyone reading a pleading in this case can determine otherwise, and it has never been asserted otherwise. The statement of the Ninth Circuit quoted by Petitioner in support of this unusual assertion was preceded by an entire paragraph which gives it its meaning:

> "The Plaintiff falls back on its United States Citizenship as the sole and only possible basis for suing these Defendants in a Court of the United States. This is not enough. In an era of increasing international commerce, parties who choose to engage in international transactions should know when their foreign operations lead to litigation they cannot expect always to bring their foreign opponents into a United States forum when every reasonable consideration leads to the conclusion that the site of the litigation should be elsewhere." Appendix to the Petition at A-4.

This statement was obviously a general reference to foreign defendants in commercial situations involving personal jurisdiction questions and not to Baychem.

The other assertions advanced by Petitioner in this section of the brief have been previously discussed and will not be belabored here.

REASONS FOR DENYING THE WRIT

I

A DISTRICT COURT HAS INHERENT DISCRETIONARY POWER TO DISMISS A COMPLAINT ON THE BASIS OF *FORUM NON CONVENIENS*, NOTWITHSTANDING 28 U.S.C § 1404(a) (1976).

Notwithstanding the passage of 28 U.S.C. § 1404(a) (1976) in 1948, the district court retains the inherent discretionary power to refuse jurisdiction on the ground of *forum non conveniens*. *Fitzgerald* v. *Texaco*, 521 F.2d 448 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976); *Paper Operations Consultants International Ltd.* v. *SS Hong Kong Amber*, 513 F.2d 667 (9th Cir. 1975); *J. F. Pritchard & Co.* v. *Dow Chemical of Canada, Ltd.*, 462 F.2d 998 (8th

Cir. 1972); *Yerostathis* v. *A. Luisi, Ltd.*, 380 F.2d 377 (9th Cir. 1967); *Prack* v. *Weissinger*, 276 F.2d 446 (4th Cir. 1960); *Vanity Fair Mills, Inc.* v. *T. Eaton Co.*, 234 F.2d 633 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956); *Gross* v. *Owen*, 221 F.2d 94 (D.C. Cir. 1955); 1 J. MOORE, FEDERAL PRACTICE ¶ 0.145 (2d ed. 1975). 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3828 (1976).

Petitioner relies on a statement from *Norwood* v. *Kirkpatrick*, 349 U.S. 29 (1955) to the effect that 28 U.S.C., § 1404(a) eliminated dismissal of an action for *forum non conveniens*. However, that case involved no foreign parties and no foreign transactions. The only issue before this Court in *Norwood* was whether the case should have been transferred from one district court to another district court where the factors which led to the transfer order would not have been a sufficient showing of inconvenience to warrant dismissal for *forum non conveniens* prior to 1948. This case held merely that the statute was "intended to permit courts to grant transfers upon a lesser showing of inconvenience" than that required by the doctrine of *forum non conveniens*, 349 U.S. at 32, and that the order of transfer was proper. *Norwood*, therefore, does not conflict with the Ninth Circuit's finding in this case that, because the district court does not have the power to transfer this case to the proper jurisdiction, Mexico, it has the inherent power to refuse the case after analysis under the stricter requirements of *forum non conveniens*.

Petitioner's assertion that there is a "conflict in the circuits" involving this question is shown untrue by an examination of the very cases cited by Petitioner. None of them involved a contention that a foreign country was the proper venue. *Collins* v. *American Automobile Insurance Co.*, 230 F.2d 416 (2d Cir. 1956) reversed a dismissal of a suit in the Southern District of New York where the dismissal was based on a finding that the proper venue was in the Eastern District of Louisiana. Moreover, *Collins* was decided by the Second Circuit about the same time as it decided *Vanity Fair, supra*, and the latter case held precisely the opposite of what Petitioner contends the former case stands for. It is obvious that the Second Circuit dealt with different issues in the two cases.

Similarly, *B. M. Heede, Inc.* v. *West India Machinery & Supply Co.*, 272 F. Supp. 236 (S.D.N.Y. 1967), involved a denial of a motion to dismiss or transfer to the District of Puerto Rico for *forum non conveniens*. *Harbolt* v. *Carpenter*, 536 F.2d 791 (8th Cir. 1976), reversed a dismissal of a suit in the Western District of Missouri for improper venue upon a finding that the proper venue was in the District of Kansas. Moreover, the Eighth Circuit did not overrule the previous Eighth Circuit case, *J. F. Prichard & Co., supra*, which held that the trial court has discretionary power to dismiss for *forum non conveniens* where a foreign venue was proper. *Kisko* v. *Penn Central Transportation Co.*, 408 F. Supp. 984 (M.D. Pa. 1976), granted a motion to transfer between district courts.

Thus, the district court has inherent power to dismiss a case for *forum non conveniens* where, after a proper analysis, it finds a foreign venue required. There is no conflict among the circuit courts concerning this point.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE CASE AS AGAINST RESPONDENT BAYCHEM ON THE GROUND OF *FORUM NON CONVENIENS*; THE NINTH CIRCUIT COURT OF APPEALS APPLIED THE PROPER STANDARD IN REVIEWING THE DISTRICT COURT'S DECISION AND AFFIRMANCE WAS PROPER.

A. Construction of the Pleadings and Other Materials Presented to the District Court on a Motion to Dismiss for Lack of Personal Jurisdiction or for *Forum Non Conveniens*.

Petitioner contends at page 23 of the Petition that pleadings and "other material should be construed favorably to the Plaintiff when considering a Motion to Dismiss based on lack of personal jurisdiction or proper forum." The very citations contained in the Petition at this point show this to be incorrect. 5 C. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1363 (1969), describes motions under Fed. R. Civ. P. 12 (b) (2) (lack of *in personam* jurisdiction) and (3) (improper forum), as defenses by way of abatement which do not go to the sufficiency of the pleading. *Id.* at 654. The burden is on the pleader to establish personal jurisdiction. *Id.* Thus such a motion to dismiss is to be decided by the trial court in the same manner as any other "speaking motion," namely, by examination of the discovery filed in court, affidavits, etc. With respect to a *forum non conveniens* motion, however, the district court and the Ninth Circuit properly placed the burden of showing improper venue on movant Baychem. *Id.* at 655; *Burt* v. *Isthmus Development Co.*, 218 F.2d 353, 357 (5th Cir.), *cert. denied*, 349 U.S. 922 (1955). Both the district court and the Ninth District recognized the extreme burden placed upon

Respondents. However, this burden does not mean that Petitioner's pleadings and "other materials" cannot be overcome by suitable evidence presented to the district court. This principle is exemplified by *Jensen* v. *McInerney*, 299 F.Supp. 1309 (D. V. I. 1969), cited by Petitioner, where defendant's motion to dismiss for lack of personal jurisdiction failed:

> "The plaintiff contends that it is clear from the allegations of his complaint that the defendant, at the time of the plaintiff's injury, was transacting business and contracting to supply services or things in this territory . . . . these allegations may of course, later be proved by the defendant to be untrue, *but since defendant has not asked leave at this stage of the case to offer evidence to controvert them,* I must take them to be true for purposes of the present motion." 299 F.Supp. at 1312 (emphasis added).

Obviously a defendant may challenge the allegations of a complaint in the context of a *forum non conveniens* or personal jurisdiction motion. The record in this case shows that Petitioner's allegations were indeed challenged and overcome.

The other case cited by Petitioner, *United States* v. *Orshek*, 164 F.2d 741 (8th Cir. 1947), stated only that it was the defendant's burden to show that neither of them resided in that division of the district court if they were to challenge venue under the Miller Act, and that since defendants had not produced any affidavits or other evidence, and since both had been personally served within the district, venue was held to be proper. See also *Timberlane Lbr. Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976) (Summary judgment treatment not required for "speaking motion" to dismiss for lack of subject matter jurisdiction).

Therefore, the district court decided the *forum non conveniens* issue on the basis of the facts it found from the record herein. The application of the doctrine of *forum non conveniens* is entrusted to the sound discretion of the trial court and may be reversed only if it constitutes an abuse of discretion—it is not the reviewing court's role to decide how it would have ruled on the case had the facts been presented to it. *Papers Operations Consultants International, Ltd., supra,* 513 F.2d at 670.

B. The District Court's Dismissal of this Case as Against Respondent Baychem on the Ground of *Forum Non Conveniens* Was Not an Abuse of Discretion.

The principles governing federal *forum non conveniens* issues were set out in the opinion of Mr. Justice Jackson in *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947). There are generally two areas of inquiry when a court is confronted with a *forum non conveniens* motion (to be distinguished from a motion presented pursuant to 28 U.S.C. § 1404(a)): the private interests of the litigants and the public interests. In assessing the interests of the litigants, the factors relied on include plaintiff's initial choice of the forum; relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining the attendance of willing witnesses; possibility of view of the premises, if that would be appropriate; questions as to the enforceability of a judgment if one is obtained; relative advantages and obstacles to a fair trial for the parties; and all other practical considerations that make the trial of a case easy, expeditious, and inexpensive. This may be described as the nexus between the forum and the alleged wrong. In assessing the public interest, considerations include administrative difficulties that follow from court congestion; a local interest in having localized controversies decided at home and a

reluctance to burden the people residing in the forum with a case having nothing to do with that forum; and the appropriateness of having the trial of a diversity case in the forum that is at home with the law that must govern the case, rather than having a court in some other forum untangle problems in conflicts of laws, and in law foreign to itself. *Gulf Oil Corp.* v. *Gilbert, supra.*

Although the plaintiff's choice of forum should rarely be disturbed unless on the balance it would be unfair and vexatious to the defendant to require him to litigate in that forum, the burden of showing vexation and unfairness certainly is not overwhelming. In the case *sub judice,* Petitioner's choice of the District of Arizona as its forum could only have been because it resided therein. This and the fact that the bell peppers were rejected by a border station which happened to be located in Arizona are the only facts connecting this case with the forum. This could hardly be called a nexus between the forum and Petitioner's case. On the other hand, the district court was presented with facts that showed that allowing the litigation to proceed in Arizona would be patently unfair and vexatious to the defendants. Concerning access to proof, the alleged misrepresentations and warranties were made by Mexican citizens in Mexico to other Mexican citizens. The laws and the statutes of Mexico were relied on in the complaint and the violations thereof were alleged to have occurred in Mexico. The witnesses as to these matters obviously could not be compelled to attend the trial of the case in Arizona, leaving Baychem in the position of having to defend a case made up of evidence produced by witnesses called by Petitioner, with no compulsory process available to obtain evidence from others who had knowledge of the allegations in order that they could be made to testify for Baychem. From the size of the record in this case, consisting mainly of discovery directed towards the jurisdictional and *forum non conveniens*

issues, it is clear that more discovery would be had and that many witnesses would be involved, most of whom would be beyond process. These include people having direct knowledge of the transactions which are the subject of the complaint, most of whom were present in Mexico where the Tamaron was allegedly sold in violation of Mexican law, where the insecticide was allegedly warranted and misrepresented to Mexican growers, where it was allegedly applied to Mexican crops pursuant to information furnished by Mexican citizens to the Mexican growers, and where such crops were subsequently harvested, packaged, and shipped by Mexican residents to the United States. Furthermore, with respect to Petitioner's alleged damages, an unidentified but substantial portion of the vegetables financed by Mizokami and turned back at the border may have been consumed in Mexico. (R. 1087-88) Although the total number of witnesses concerning all of the above aspects of the case can only be speculated, it is apparent that the number would be substantial. None of them could be compelled to be in attendance in the United States, whether in support of Petitioner's or Respondents' contentions. The only jurisdiction where a trial of this matter would be fair is Mexico.

Moreover, the complaint relies on Mexican law, and based on Arizona's choice of law principles, the law of Mexico would apply to the allegations in any event. *Schwartz* v. *Schwartz,* 103 Ariz. 562, 447 P.2d 254 (1968). Neither the parties nor the judge could offer clear translations and opinions of that Mexican law which was considered in the trial court. Transcript of the Hearing on Motions to Dismiss at 44 [Supplemental Designation of Record on Appeal]. It would be both unjust and improper for the district court inadvertently to apply Mexican law in a manner different from that which would govern if the Mexican courts conducted the trial. Mizokami can proceed in Mexico and that is the only proper forum.

With respect to the public interests of the forum, beyond the manifest unfairness to all of the Respondents, the litigation of this case in the district court in Arizona would impose an extreme burden on the resources of that court and the community. Once again, most sources of proof and material witnesses are located in Mexico; most witnesses are likely to speak only Spanish; any documents related to the litigation are undoubtedly written in Spanish; and it is conceded the case is to be governed by Mexican law. Thus, the language barrier would be an additional hardship imposed upon a district judge and an American jury attempting to understand, interpret and evaluate Mexican citizens' testimony and documents written in Spanish. The translations of questions and answers alone would automatically at least double the time ordinarily required for the testimony in the case. The case is so entirely Mexican that it brings to mind the comment of the Eighth Circuit in *J. F. Pritchard & Co., supra,* where, after dismissing a plaintiff's complaint against a Canadian defendant on *forum non conveniens* grounds because the plaintiff's Canadian subsidiary had contracted with defendant and then had assigned its rights to the plaintiff, the Court said:

> "There was more than a Canadian nexus here. The whole case is Canadian . . . . [Plaintiff] made his bed in Canada; now he must lie in it if he wishes to proceed." 462 F.2d at 1002.

Beyond the appropriateness of this admonition to the Petitioner here, it is simply unfair to Respondents to require them to litigate in an American court this Mexican cause of action which must be proved and defended against by Mexican witnesses, documents, etc., and the trial of which should rightfully be a burden carried by the courts of Mexico rather than by the United States and the District of

Arizona. *Gulf Oil Corp.* v. *Gilbert, supra; J. F. Pritchard & Co.* v. *Dow Chemical of Canada, Ltd., supra; Paper Operations Consultants International, Ltd.* v. *SS Hong Kong Amber, supra; Hoffman* v. *Goberman,* 420 F.2d 423 (3d Cir. 1970).

III

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI.

Review on writ of certiorari is not a matter of right but of sound judicial discretion. *Ireland* v. *Woods,* 246 U.S. 323 (1917). Supreme Court Rule 19 provides that a writ will be granted only where there are special and important reasons therefor. It is to be exercised sparingly and only in cases of gravity and importance, *J. I. Case Co.* v. *NLRB,* 321 U.S. 332 (1944); *Rogers* v. *Helvering,* 320 U.S. 410 (1943), since, if carelessly exercised, it might defeat the very purpose of the Article creating the Supreme Court, and the act creating the courts of appeals. There seems to be no clearcut definition of what the term "special and important reasons" means, but it would seem that Petitioner would be obligated to call to the attention of the Court some reason of importance that would justify the granting of a petition for a writ of certiorari. Petitioner's attempt to make this case appear to be of particular significance fails upon examination of the cases its Petition cites.

CONCLUSION

There are no special and important reasons for the granting of a writ of certiorari in this case. There is no conflict among the circuit courts concerning the legal principles involved herein. The opinion of the Ninth Circuit Court of Appeals is not in conflict with previous opinions of this Court. The District Court for the District of Arizona correctly applied the legal principles and weighed the voluminous evidence presented to it before rendering its decision. That decision was not an abuse of discretion. Certiorari should be denied.

Respectfully submitted,

S. THOMAS CHANDLER

CHANDLER, TULLAR, UDALL & REDHAIR
1110 Transamerica Building
177 North Church Avenue
Tucson, Arizona 85701

Attorney for Respondent, Baychem Corporation

Of Counsel:

JACK REDHAIR

ROBERT E. LUNDQUIST

CHANDLER, TULLAR, UDALL & REDHAIR
1110 Transamerica Building
177 North Church Avenue
Tucson, Arizona 85701

Appendices

April 14, 1977

The Honorable Walter Ely
Judge, U.S. Court of Appeals
1621 U.S. Courthouse
Los Angeles, California 90012

Re: Mizokami vs. Baychem
No. 752991

Dear Judge Ely:

With reference to your question, "Will the Baychem Corporation waive any applicable statute of limitations which might be available if this litigation were filed in the country of Mexico?" the answer is that Baychem Corporation will waive any applicable statute of limitations which may or might be available to Baychem Corporation if the United States Court of Appeals for the Ninth Circuit affirms the decision of the District Court, District of Arizona, and if plaintiff in the above-captioned matter files in substance the identical lawsuit in the country of Mexico.

Your very truly,

CHANDLER, TULLAR, UDALL & REDHAIR

By .....

JR/sa
cc: John F. Molloy, Esq.
Jack Brown, Esq.
Wright W. Crummett, Esq.